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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.6.2007

CORAM

THE HON'BLE MR.JUSTICE S.ASHOK KUMAR

Tr CMP No. 30 of 2007
and M.P.No. 1 of 2007

Mala @ Mahalakshmi
D/135(M) BN CRPF,
Digambler Jain Dharmasala
Katra Ayoothya (P.O)
Faziapad District
U.P.State ...Petitioner

Vs.

R.Nandakumar ... Respondent

Tr.CMP is filed under Section 23(3) of CPC to withdraw HMOP.No:112 of 2005 pending on the file of the Sub Court, Mettur and transfer the same to the Family Court, Faziabad, Uttar Pradesh for enquiry and disposal in accordance with law.

For Petitioner : Mr.P.Mani
For Respondent : Mr.M.Sathyanarayanan

ORDER

This Tr.CMP is filed by the petitioner/wife under Section 23(3) of CPC to withdraw HMOP.No:112 of 2005 pending on the file of the Sub Court, Mettur and transfer the same to the Family Court, Faziabad, Uttar Pradesh for enquiry and disposal in accordance with law.

2. According to the petitioner, the respondent/husband filed the HMOP No:112 of 2005 before the Sub Court, Mettur against her for divorce under Section 13(1)(ia) of the Hindu Marriage Act on the ground that after marriage the petitioner/wife failed to conduct herself as a dutiful wife and give respect to him and elders; that she refused to resign the job as agreed earlier, that the petitioner/wife and her parents did not respect him and directed him to get out of the house when he visited her house after delivery of the child; that the petitioner refused to come to the matrimonial home inspite of several compromise talks by the elders of the family, instead she had used unparliamentary words against the respondent; she very often resided at

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her parent's house even when she comes during her holidays; she had taken all her belongings, Sridhana properties and she did not have the intention to live along with the respondent.

3. The petitioner herein resisted the said HMOP by filing a counter stating that it is only the petitioner has ill-treated her and scolded with filthy language. At the time of marriage the petitioner was working as Police Constable in the CRPF and posted at Gujarat State. The respondent/husband was jobless and therefore the respondent and her parents requested not to leave the job. Therefore, after yearly leave, she went to Delhi and came to know of her pregnancy. Thereafter the petitioner several times tried to contact the respondent over phone, but he was not available whenever he was called by her. When she was in 4 months pregnancy she came to Mettur on leave to inform the same to her husband. But she found the door was locked and after informing the neighbours she went to her parent's house. Even after knowing the news, the respondent did not come and see her. Even for the Valaikappu neither the respondent nor his parents attended the function. After delivery of the male baby the respondent did not come and see the child. She denies the allegation that she had not taken her Sridhana properties to her house and she had no intention to live along with the respondent/wife.

4. Learned counsel for the petitioner contended that the respondent very well know that the petitioner can come to Mettur whenever she gets leave since she is working in the CRPF. At the time of marriage all such matters regarding the petitioner's job, her leave days and other Rules and Regulations of the CRP have been clearly informed to the petitioner and the respondent also agreed and accepted the above facts. Thre has been cohabitation even during the month of November, 205 and there is no cause of action for the petitioner and there is no desertion as alleged by the respondent. The petitioner is always willing to live with the respondent and as she is working in the CRPF in Uttar Pradesh now she finds it very difficult to come over to Mettur and attend the enquiry by taking leave frequently. Further she is also having the one year old child along with her and also she has no one to accompany her every time and apart from that she has to spend huge amount towards travelling. Therefore if transfer of the HMOP is not ordered to Uttar Pradesh Court the petitioner will be put to irreparable loss and hardship.

5. Per contra, learned counsel for the respondent contended that the respondent is working only as a Supervisor in the TASMAC at Mettur, which is only a temporary job and he cannot take leave as that of the petitioner and also he is earning only a sum of Rs.3000/= and cannot afford for going to Uttar Pradesh for enquiry. Further the child is living with the parents at Mettur and the petitioner used to come periodically during her annual leave of two months and other leave periods to her parental home at Mettur and there is no inconvenience for the petitioner to come and attend the HMOP proceedings at Mettur. Further the respondent has to look after his ailing mother at Mettur and cannot go to other States to attend the hearing, apart from the fact that he and his witnesses are not acquainted with Hindu language.

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Further, as the petitioner is posted at various places, like Gujarat, Delhi and now at Uttar Pradesh, even if the case is transferred to U.P., it would become futile if the petitioner is transferred to some other State.

6. The Andhra Pradesh High Court in Mamta Gupta V.Mukund Kumar Guptha reported in AIR 2000 AP. 394 held that the High Courts are empowered by Section 23(3) CPC to transfer a case and it is for the party seeking transfer either to choose the form under Section 25 or 23 depending upon his social, economic status. But, to say that the party has to file an application only before the Supreme Court under Section 25, would amount to emasculating Section 23(3). Both the provisions are independent and option is left to the party approaching the court for transfer. Therefore, Section 25 did not overlap Section 23(3) CPC.

7. In 2003 AIHC 2876, (Vempati Sarada Vs.Vempati Kaladhar), another learned Judge of the Andhra Pradesh reiterated the same position and held thus:-

> "11. A reading of both the provisions will clearly go to show that these provisions are independent provisions and absolutely there is no conflict between these two provisions. Merely because the High Court is empowered to order transfer of a proceeding pending before a Subordinate Court within its jurisdiction to another Court Subordinate to another High court, it may not come in the way of the powers which may be exercised by the Supreme Court under Section 25 of the Code. Hence, by a close reading of both provisions aforesaid, I am of the considered opinion that the power under Section 23(3) of the Code can be definitely exercised by this Court and the same is not in any way curtailed by Section 25 of the Code. In fact, I am well supported in this regard by the view expressed by this Court in Mamta Gupta's case. Hence, in view of the same, I am of the considered opinion that such power can be exercised by invoking Section 23(3) of the Code. Further, taking into consideration the nature of allegations made in the affidavit filed in support of the Transfer CMP and also the allegations made in the counter affidavit filed by the respondent/husband, i am also of the opinion that in view of the facts which had been explained by the petitioner/wife definitely she is entitled to the relief as prayed for in the present transfer CMP."

8. In an identical case, where the wife filed a petition under Section 13 before the Bombay City Civil Court and later the husband filed a petition under Section 13 before the Family Court at Jaipur, the Rajasthan High Court (Jaipur Bench) held as follows (Sunita bali Vs. Ashok Bali (AIR 1987 Rajasthan 79):-

> "The divorce petition filed by the husband in the Family Court at Jaipur could be transferred under Section 21-A, to the matrimonial court at Bombay, where the earlier Petition of the wife was presented, notwithstanding that the

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> procedure for disposal of Petition is followed by the Family Courts under the Family Courts Act, 1984 was substantially different from the procedure followed by other matrimonial courts. The power of transfer could be exercised in the circumstances provided under Section 21-A Hindu Marriage Act,1955, and such powers were not subject to the procedure to be adopted by the different matrimonial courts. The power to transfer Petition in such circumstances, enumerated in S.21-A could not be whittled down because the two matrimonial courts were required to dispose of the mater by adopting different procedures. S.21-A, Hindu Marriage Act, required that the later Petition should be transferred to the District Court in which the earlier petition was presented and both the petitions had to be heard and disposed of together by the District Court in which the earlier Petition was presented. Since the earlier petition in the instant case was presented to the District Court at Bombay, the later Petition filed in the Family Court at Jaipur had to be transferred to the District Court at Bombay, and the power to transfer such Petition vested, by virtue of Section 23(3) CPC in the Jaipur High Court to which the Family Court at Jaipur was subordinate. Sub Section (3), S.23, Civil P.C., laid down that where the civil Courts were subordinate to different High Courts, the application had to be made to the High Court within the local limits of whose jurisdiction the court in which the suit was brought was situate. In the instant case, the Bombay City Civl Court where the earlier Petition was presented, was subordinate to the Bombay High Court and the Family Court at Jaipur, where the later petition was filed, was subordinate to the Jaipur High Court. Therefore, as the civil courts, where the petitions were presented, were subordinate to different High Courts, and the later Petition had to be presented to the District Court in which the earlier petition was presented, the power of transfer lay in the Jaipur High Court, within whose jurisdiction the District Court in which the later petition was presented was situate."

9. From the above judgments it is clear that the proposition of law has been well settled that this is the competent Court having jurisdiction under Section 23(3) CPC to entertain this Transfer CMP as it is for the party seeking transfer either to choose the form under Section 23(3) or 25 and further as per Section 23(3) CPC, where such courts before which two matrimonial cases pending are subordinate to different High Courts, the application shall be made for transfer to the High Court within the local limits of whose jurisdiction to Court in which the petition is brought is situate.

10. Further, in the decision of the Supreme Court in Neelam Kanwar Vs. Devinder Singh Kanwar, reported in 2000 (10) SCC 589, Their Lordships have held as follows:-

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> "4...We are mindful of the fact that the petitioner is a lady and the first respondent is a male and therefore convenience-wise a transfer to the place where the lady is residing would be preferred by this Court, unless it is shown that there are special reasons not to do so. No such special reason is shown"...

11. Considering the facts and circumstances of the case that the petitioner being employed in the CRPF, she cannot take leave frequently to attend the enquiry, and also the fact that she is having the one year baby as alleged by her and also the fact that it is only the respondent who has filed the petition for divorce and the petitioner is willing to live with him, I am of the view that this is a fit case where the HMOP filed by the respondent/husband has to be transferred to the Family Court at Faziabad, Uttar Preadesh for the convenience-wise sake of the petitioner/wife. Accordingly, the HMOP No:112 of 2005 pending on the file of the learned Subordinate Judge, Mettur is directed to be transferred to the Family Court at Faziabad, Uttar Pradesh for enquiry and disposal in accordance with law.

12. Tr.CMP is ordered accordingly. Consequently, connected MP is closed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

gkv

Copy to:

1. The Subordinate Judge,
   Mettur

2. The Family Court, Faziabad,
   Uttar Pradesh.

1 cc To Mr.J.Ramakrishnan, Advocate, SR.34443.

Tr.CMP.No.30 of 2007

ARK(CO)
RVL 25.06.2007

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